

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A medical contested case hearing was held on January 13, 2009 to decide the following disputed issues:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (hereinafter "IRO") that the Claimant / Petitioner is not entitled to electrodiagnostic testing for the compensable injury of _____?

PARTIES PRESENT

Petitioner appeared without representation. Respondent / Carrier appeared and was represented by JTM, adjuster. The Claimant did not appear.

BACKGROUND INFORMATION

Claimant injured his back when he fell at work on _____. He had a prior back surgery in 2002. An MRI revealed disc herniations at L1-L2, L3-L4, and L5-S1 with a disc protrusion at L5-S1. A request was made for bilateral lower extremity nerve conduction velocity studies and bilateral lower extremity EMG testing. Such requested treatment underwent utilization review and was denied. Reconsideration was requested and such reconsideration was denied. The Petitioner then appealed the denials to an IRO and the IRO reviewer upheld the previous adverse determinations. Consequently, the Petitioner appealed the IRO decision and is the reason for the present discussion and decision.

DISCUSSION

Medical Necessity

An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. TEX. LAB. CODE § 408.021. "Health care reasonably required" is defined as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine or, if evidence-based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. TEX. LAB. CODE § 401.011 (22a). Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. "Evidence-based medicine" means the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current

scientifically based texts and treatment and practice guidelines. TEX. LAB. CODE § 401.011 (18a).

In accordance with the above statutory guidance, the Division has adopted treatment guidelines by rule. 28 Tex. Admin. Code § 137.100 (Division Rule 137.100). This Rule directs health care providers to provide treatment in accordance with the current edition of the *Official Disability Guidelines* (hereinafter "ODG") and that such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG.

The pertinent provisions of the ODG applicable to this case are as follows, to wit:

Electrodiagnostic studies (EDS)	See <u>Nerve conduction studies</u> (NCS) and <u>EMGs</u> (EMG)
EMGs (electromyography)	Recommended as an option (needle, not surface). EMGs (electromyography) may be useful to obtain unequivocal evidence of radiculopathy, after 1-month conservative therapy, but EMG's are not necessary if radiculopathy is already clinically obvious. (Bigos, 1999) (Ortiz-Corredor, 2003) (Haig, 2005) No correlation was found between intraoperative EMG findings and immediate postoperative pain, but intraoperative spinal cord monitoring is becoming more common and there may be benefit in surgery with major corrective anatomic intervention like fracture or scoliosis or fusion where there is significant stenosis. (Dimopoulos, 2004) EMG's may be required by the AMA Guides for an impairment rating of radiculopathy. (AMA, 2001) (Note: Needle EMG and H-reflex tests are recommended, but Surface EMG and F-wave tests are not very specific and therefore are not recommended. See <u>Surface electromyography</u> .)
Nerve conduction studies (NCS)	Not recommended. There is minimal justification for performing nerve conduction studies when a patient is presumed to have symptoms on the basis of radiculopathy. (Utah, 2006) See also the <u>Carpal Tunnel Syndrome Chapter</u> for more details on NCS. Studies have not shown portable nerve conduction devices to be effective. <u>EMGs</u> (electromyography) are recommended as an option (needle, not surface) to obtain unequivocal evidence of radiculopathy, after 1-month conservative therapy, but EMG's are not necessary if radiculopathy is already clinically obvious.

In the instant case, both parties relied on the ODG in support of their respective positions for or against the requested treatment. When both parties cite the ODG in support of their respective positions, such positions must be supported by sufficient medical evidence to justify application of the ODG in the manner promulgated. Both of the utilization review doctors denied the requested treatment and the IRO reviewer upheld the denial of the requested treatment citing to relevant provisions of the ODG. Specifically, there was mention of discrepancies in the clinical examinations of the examining doctor which called into question whether the Claimant had radiculopathy or not. See ODG, *supra*. As such, the IRO reviewer who is board certified in chiropractic, physical medicine and rehabilitation, and pain management reviewed the records and upheld the adverse determinations of the utilization review doctors. Essentially, the IRO reviewer cited the ODG and opined that because of the conflicting clinical evidence obtained as a result of the physical examinations, the requested treatment could not be approved. Thereafter, the IRO reviewer cited the ODG, medical judgment, clinical experience and expertise in accordance with accepted medical standards in upholding the denials of the requested treatment.

When weighing expert testimony, the hearing officer must first determine whether the doctor rendering an expert opinion is qualified to offer such. In addition, the hearing officer must

determine whether the opinion is relevant to the issues at bar and whether it is based upon a reliable foundation. An expert's bald assurance of validity is not enough. See Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999); E.I. Du Pont De Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. See Black, 171 F.3d 308. In determining reliability of the evidence, the hearing officer must consider the evidence in terms of (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of the person who applied the technique on the occasion in question. Kelly v. State, 792 S.W.2d 579 (Tex. App.-Fort Worth 1990) *aff'd*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

The Petitioner, as the party appealing the IRO decision, has the burden of overcoming the IRO decision by a preponderance of evidence-based medical evidence. The IRO decision in this case is based on the ODG and noted that the Claimant's medical records failed to establish the necessary criteria as prescribed in the ODG. In this particular case, the Petitioner relied upon his testimony alone as no medical records were presented and failed to provide sufficient evidence-based medical evidence to justify application of the ODG in the manner propounded. Given the current state of the evidence, evidence-based medical evidence was lacking in this case as the Petitioner's evidence did not show compliance with the ODG or any other evidence-based medicine guidelines. As such, the Petitioner failed to meet his burden of proof in this case. Therefore, the preponderance of the evidence is not contrary to the decision of the IRO that the Claimant is not entitled to electrodiagnostic testing for the compensable injury of _____.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:
 - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. On _____, Claimant was the employee of (SELF-INSURED EMPLOYER), Employer.
 - C. On _____, Claimant sustained a compensable injury.
2. Carrier / Respondent delivered to Claimant / Petitioner a single document stating the true corporate name of Carrier / Respondent, and the name and street address of its registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. The IRO determined that the requested electrodiagnostic testing was not reasonable and necessary health care services for the compensable injury of _____.

4. Electrodiagnostic testing is not health care reasonably required for the compensable injury of _____.

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, does not have jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of the IRO that electrodiagnostic testing is not health care reasonably required for the compensable injury of _____.

DECISION

The Claimant is not entitled to electrodiagnostic testing for the compensable injury of _____.

ORDER

The Carrier / Respondent is not liable for the benefits at issue in this hearing. The Claimant remains entitled to medical benefits for the compensable injury in accordance with § 408.021.

The true corporate name of the insurance carrier is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

(SELF-INSURED)
(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE)

Signed this 11th day of May, 2009.

Julio Gomez, Jr.
Hearing Officer